

US EPA ARCHIVE DOCUMENT



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EPA Responses to Comments on *EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples*

Introduction

This document contains the Environmental Protection Agency's (EPA) final responses to the consolidated comments received from federally recognized tribes and the public during the May –June 2014 tribal consultation and public comment periods for the development of the *EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples* (Policy). As a result of the comments received, EPA has made significant changes to the Policy. A copy of the final Policy can be found at <http://www.epa.gov/environmentaljustice/indigenous/index.html>.

Throughout the tribal consultation and coordination, and the public input process, the EPA used a variety of mechanisms to exchange ideas and suggestions for how to improve the Policy, including: webinars; teleconference calls; email exchanges; written input; face-to-face meetings with tribal government staff; direct engagement with tribal government officials and tribal community organizations; and meetings with indigenous organizations. Over the three year development phase, EPA received written comments from tribal governments, intertribal organizations, EPA's National and Regional Tribal Operations Committees, EPA's Tribal Partnership Councils, tribal organizations, tribal/indigenous community-based organizations, individual tribal members, non-governmental associations, academia, and industry.

This document summarizes the common issues raised during the final tribal consultation and public comment period, as well as how the EPA has addressed the issues in the final Policy. Similar comments have been grouped and summarized for clarity and efficiency.

RESPONSE TO COMMENTS

Comment 1 **Include recognition of treaty rights in the Policy and promulgate an agency-wide directive to uphold and protect treaty rights in decision making.**

Response 1 On December 1, 2014, EPA Administrator McCarthy issued a statement on Treaty Rights: "Under the U.S. Constitution, treaties have the same legal force as federal statutes. And the United States' government-to-government relationship with and trust responsibility to federally recognized Indian tribes reinforces the importance of honoring these treaty rights. As such, the EPA has an obligation to honor and respect tribal rights and resources protected by treaties. While treaties do not expand the EPA's authority, the EPA must ensure its actions do not conflict with tribal treaty rights. In addition, EPA programs should be implemented to enhance protection of tribal treaty rights and treaty-covered resources when we have discretion to do so. To help guide the agency's decisions when treaty rights should

be considered, the Office of General Counsel and the American Indian Environmental Office will develop an analytical framework, with input and consultation from other EPA offices and tribal governments.”

Comment 2 EPA should develop two environmental justice policy documents: one for federally recognized tribes, and a separate policy for indigenous peoples.

Response 2 EPA acknowledges its’ relationship with federally recognized tribal governments is different than the relationship that EPA extends to tribal members, state-recognized tribes, and others living in Indian country. The Policy is inclusive of federally recognized tribes, all other indigenous peoples, and others living in Indian country. The Policy speaks to the Agency’s responsibilities to work with all interested parties in addressing their environmental justice concerns throughout Indian country and in other areas of interest to indigenous peoples throughout the United States, which cannot effectively be addressed without coordination and collaboration with federally recognized tribes. The Agency seeks to work with federally recognized tribal governments in accordance with EPA’s 1984 Indian Policy and the 2011 EPA Policy on Consultation and Coordination with Indian Tribes, and to fulfill the Agency’s primary mission of protecting public health and the environment for all within the United States.

In addition, EPA believes that a single policy best serves the Agency’s goal of this Policy, which is to clarify the manner in which the Agency incorporates environmental justice into its work with federally recognized tribes, indigenous peoples, and others living in Indian country, while avoiding the confusion and redundancy that may occur under two separate, overlapping environmental justice policies.

Comment 3 Resources not located within Indian country but which are utilized by tribal members may not be afforded protection by this Policy.

Response 3 EPA has addressed this comment by clarifying the scope of this Policy to include the areas of interest to tribes and other indigenous peoples throughout the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands.

Comment 4 EPA should incorporate into the Policy the principles of the United Nations Declaration on the Rights of Indigenous Peoples (UN DRIP).

Response 4 The final Policy document states that the “EPA recognizes the importance of the United Nations Declaration on the Rights of Indigenous Peoples and the principles that are consistent with the mission and authorities of the Agency.” This statement was placed in the Environmental Justice Principles section to indicate its relevance to the 17 principles of the Policy. The UN DRIP, “[w]hile not legally binding or a statement of current international law—has both moral and political force¹. Many of the principles in the Policy are reflective of the “articles” expressed in the Declaration.

Comment 5 How does this Policy apply when overseeing or approving State-delegated programs? State programs and actions that do not adhere to the principles

¹ Announcement of U.S. Support, December 16, 2010, U.S. Department of State.
<http://www.state.gov/documents/organization/184099.pdf>

of Environmental Justice should not be supported or approved by EPA

- Response 5 EPA acknowledges that historical tensions between states and tribes exist. Within the context of this Policy, EPA encourages federal agencies and state and local governments to incorporate environmental justice principles into their programs, policies, and activities that may affect federally recognized tribes, indigenous peoples throughout the United States, and others living in Indian country.
- Comment 6 The use of the term “tribal areas” should be removed.**
- Response 6 EPA agreed with this comment and has removed references to “tribal areas”.
- Comment 7 EPA must consult with tribes when they adopt and revise guidance or policy that have the potential to impact tribes. There are no specific draft tasks [principles] associated with this revised Policy to address this problem.**
- Response 7 EPA’s first principle established in this Policy recognizes EPA’s requirement to consult with federally recognized tribes and consider the potential impact of Agency actions that may affect tribal human health or environmental interests. Over the three-year process of developing this Policy, EPA conducted three separate tribal consultations: the first to obtain input on the initial concepts and possible focus areas of the Policy; the second to receive input on the first draft; and the final consultation was on the revised draft of the Policy. EPA does have a separate policy for tribal consultation that lays out EPA’s consultation processes. This document is located at <http://www.epa.gov/tribalportal/pdf/cons-and-coord-with-indian-tribes-policy.pdf>
- Comment 8 Tribal governments have raised concerns regarding EPA’s relationships and interactions with tribal members on environmental justice issues.**
- Response 8 EPA is committed to working with tribal governments on a government-to-government basis, including addressing their environmental justice concerns. EPA is also responsible for ensuring its programs, policies, and activities are implemented in an effective and fair manner, and consistent with federal environmental law, which results in the Agency also working with tribal members, indigenous peoples, and others living in Indian country.
- Comment 9 Traditional Ecological Knowledge should be approached far more rigorously, on a case-by-case basis. It should be “integrated” into EPA’s decision-making if, and only if, it comports with the best science currently available.**
- Response 9 The Agency has been making a concerted effort to coordinate and collaborate with federally recognized tribes and other indigenous peoples to identify how best to incorporate TEK into the Agency’s decision-making processes. The Agency is also seeking to learn from other federal agencies about how they have been able to effectively incorporate TEK into their decision-making processes, when appropriate. This work is ongoing.
- Comment 10 The drafted Policy creates a division between federally recognized tribes and indigenous peoples.**

Response 10 EPA was challenged inside and outside the Agency on how to ensure that EPA's environmental justice tenets were being equally applied to all. In addition, EPA had received many comments from tribes that the Policy did not adequately reflect the government-to-government relationship and the unique political status of federally recognized tribes. The division drawn in the Policy between federally recognized tribes and other indigenous peoples was to acknowledge the unique relationship the federal government [EPA] has with federally recognized tribes and to make clear to EPA staff that regardless of who had raised an environmental justice concern, all indigenous people are covered under this Policy as well.

Comment 11 Draft Policy Principles 9 and 14 impact a tribe's sovereignty.

Response 11 Policy Principle #9 calls on EPA to provide advice and recommendations to federally recognized tribes to support their own use of environmental justice principles. EPA is not requiring any federally recognized tribe to adopt environmental justice principles. EPA stands ready to support any tribe that seeks EPA's assistance in building their environmental justice capacity. However, the Agency recognizes that there are statutory requirements for public participation in the development of federal environmental programs. For this reason the Agency has included in its core capacity building indicators support for tribes to develop meaningful public participation in the development of their federally authorized environmental programs.

Policy Principle #14 recognizes and supports the use of conflict management processes. This principle affirms the use of tribal dispute resolution processes and traditional consensus building practices.

Finally, the Policy also reinforces to EPA staff that federally recognized tribes are the non-federal parties for making decisions and carrying out program responsibilities affecting their environments, and the health and welfare of their tribal communities, consistent with Agency standards and regulations, thus respecting the right to self-determination.

The Agency remains fully committed to engaging tribes on a government-to-government basis with a right to self-governance, which is a commitment the EPA made and has kept since the issuance of the Agency's Indian policy in 1984.